

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY KEVIN COMBS,

Defendant-Appellant.

UNPUBLISHED

April 14, 2005

No. 250507

Washtenaw Circuit Court

LC No. 02-001489 FC

Before: Cavanagh, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions for first-degree premeditated murder, MCL 750.316(1)(a), possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, possession of a firearm by a felon, MCL 750.224f, and carrying a concealed weapon (CCW), MCL 750.227. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent terms of life in prison for the first-degree premeditated murder conviction, fifty months' to ten years' imprisonment for the possession of a firearm by a felon conviction, and fifty months' to ten years' imprisonment for the CCW conviction. Defendant also received a consecutive two years' imprisonment for his felony-firearm conviction. We affirm.

Defendant and his half-brother, Ozzy Sizemore, had a longstanding dispute over a woman they had both dated for significant periods of time. Defendant, upset about a renewed relationship between Sizemore and the woman, began threatening to kill Sizemore. On the day prior to shooting Sizemore, defendant was taken to the hospital by ambulance because of an apparent suicide attempt. Defendant had been undergoing psychiatric treatment for approximately two years prior to these events. The next day, defendant found Sizemore at their mother's home. As defendant was walking towards Sizemore's bedroom, Sizemore stepped into the hallway and defendant opened fire on him. Sizemore died of multiple gunshot wounds.

At trial, defendant attempted to have his psychiatrist testify to his emotional state at the time of the killing because it went to the "heat of passion" element of manslaughter. The trial court initially ruled that the psychiatrist would not be able to testify, reasoning that expert testimony regarding a defendant's mental state could not be used to diminish criminal responsibility outside of legal insanity, *People v Carpenter*, 464 Mich 223; 627 NW2d 276 (2001), and that it was irrelevant because the provocation element of manslaughter is objective. *People v Sullivan*, 231 Mich App 510; 586 NW2d 578 (1998). On the final day of trial, the court

reversed itself and indicated it would permit the testimony. However, the psychiatrist was not in the courtroom, apparently because of the court's prior ruling.

Defendant argues that the trial court initially erred in precluding the psychiatrist's testimony. We disagree. Defendant consistently referred to this testimony below as expert testimony on defendant's mental condition. A trial court's ruling on the admission of expert testimony is reviewed for an abuse of discretion. *People v Phillips*, 246 Mich App 201, 203; 632 NW2d 154 (2001). The admission of expert testimony requires that: (1) the witness be an expert; (2) there are "facts in evidence which require or are subject to examination and analysis by a competent expert"; and (3) the knowledge is "in a particular area which 'belongs more to an expert than to the common man.'" *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 215; 457 NW2d 42 (1990), quoting *O'Dowd v Linehan*, 385 Mich 491, 509-510; 189 NW2d 333 (1971). Here, the psychiatrist was submitted to assist the jury's determination of whether defendant was acting in the heat of passion when he killed Sizemore.

We conclude that expert testimony was not necessary to the jury's determination of this issue, because whether defendant killed in the heat of passion is not an area of knowledge that belongs more to an expert than to the common man. *King, supra* at 215. Further, while the psychiatrist's evidence was not precluded under *Sullivan*,¹ there is no indication that the psychiatrist had any evidence to offer regarding what defendant's emotional state was at the time of the killing. According to defendant's offer of proof, the psychiatrist had last seen defendant several days before the killing. However, mitigating a murder to manslaughter is predicated on a finding that the defendant acted suddenly, on impulse, without an opportunity for cool reflection. *People v Mendoza*, 468 Mich 527, 535; 664 NW2d 685 (2003). Testimony about defendant's emotional state several days before a killing is not relevant to this question, particularly given testimony establishing that defendant was not in a state of emotional excitement just prior to shooting his half-brother. Accordingly, we see no abuse of discretion in the court's initial preclusion of the testimony. See *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999).

Defendant also asserts that he was denied effective assistance of counsel because his trial counsel failed to request a continuance so that the psychiatrist could be located. Again, we disagree. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, that there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different, and the attendant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In this case, even if counsel's failure to move for a continuance were error, there is no reasonable probability that but for the error the result of the proceedings would have been different. There was

¹ *Sullivan* observes that courts uniformly hold "that a defendant's special mental qualities are not to be considered in measuring the adequacy of the provocation." *Sullivan supra* at 519. However, the issue of the adequacy of provocation is distinct from the issue of whether a defendant was acting in the heat of passion. See *People v Mendoza*, 468 Mich 527, 535; 664 NW2d 685 (2003).

substantial evidence establishing the first-degree murder charge, including defendant's repeated threats to kill Sizemore, his retrieval of the gun that morning, the fact that he concealed the gun on his person and went to his mother's home looking for Sizemore, and that he began firing at Sizemore as soon as he saw him. This evidence also tends to undermine defendant's claim of manslaughter. Moreover, the trial court proceedings could not be said to have been fundamentally unfair based on the psychiatrist's failure to testify, when the trial court's initial decision to exclude his testimony was correct.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Kathleen Jansen

/s/ Hilda R. Gage